IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 951 of 2000
With
CRIMINAL APPEAL No. 1145 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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JANGREJKHAN FIROZKHAN PATHAN - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :

CRIMINAL APPEAL No. 951 of 2000

MR EE SAIYED for the Appellant.
MR MHM SHAIKH for the Appellant.
MR ND GOHIL, ADDITIONAL PUBLIC PROSECUTOR for the Opponent.

CRIMINAL APPEAL No. 1145 of 2000

MR MR PRAJAPATI for the Appellant
MR ND GOHIL, ADDITIONAL PUBLIC PROSECUTOR for the Opponent.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 01/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Both the above numbered appeals are directed against judgment dated September 27, 2000, rendered by the learned Additional Sessions Judge, Court No. 8, Ahmedabad City in Sessions Case No. 236 of 1999 by which the appellant in Criminal Appeal No. 951 of 2000, who was original accused No. 2 in Sessions Case No. 236 of 1999, as well as appellant in Criminal No. 1145 of 2000, who was original accused No. 1 in Sessions Case No. 236 of 1999, have been convicted under Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, *"the Act"*)and each sentenced to RI for 11 years and fine of Rs.1,00,000/- (Rupees One Lakh Only); in default, RI for 3 months, for commission of offence punishable under Section 21 of the Act as well as RI for 11 years and fine of Rs.1,00,000/- (Rupees One Lakh Only); in default RI for 3 months, for commission of offence punishable under Section 29 of the Act. As both the appeals arise out of the common judgment dated September 27, 2000, rendered in Sessions Case No. 236 of 1999, this Court proposes to dispose them of by this common judgment.

2. The facts emerging from the record of the case are as under:-

On or about July 1999, Mr. M.N.Vyas was discharging duties as Police Constable in Narcotic Cell of DCB, Ahmedabad City. On July 3, 1999, he received an information that a person named Chunilal Punmaji Marwadi wearing Red and Green coloured shirt with design and Grey coloured pant, is dealing in Brown Sugar, and that one Jangrejkhan Firozkhan Pathan, residing behind Sangam Cinema, Sarkhej, would deliver quantity of Brown Sugar to him during night near *Visama,* constructed by the Corporation, on Dudheshwar Road. The Police Constable, therefore, conveyed the information received by him to Mr. T. A. Barot, who was then PI of Narcotic Cell, DCB, Ahmedabad City. On learning about this information from Police Constable Mr. Vyas, PI Mr. Barot summoned Police Sub-Inspector Mr. G. H. Khan as well as Sub-Inspector Mr. P. P. Bhatt and other police personnel and asked them to be ready for raid to be carried out. The information received was reduced into writing and necessary entry was made in the register maintained at the Police Station. Mr.Barot also forwarded report under Section 42(2) of the Act to the Assistant Commissioner of Police, who was his immediate official superior. He, thereafter, asked Police

Constable Nizammudin Burhanmian to requistion services of two *panch-witnesses.* Accordingly, Police Constable Nizammudin Burhanmian requisitioned services of two *panch-witnesses*, namely, (1) Anand Daulal Srivastava and (1) Mohd. Farooq Mohd. Siddique Shaikh. On arrival of the *panch-witnesses*, Mr. Barot ascertained their names, addresses, etc. and introduced them to PSI Mr. Khan, PSI Mr. Bhatt, etc. Mr. Barot conveyed to the *panch-witnesses* the information, which was received by him from Police Constable Mr. M. N. Vyas, and tried to know whether they were willing to act as *panch-witnesses*. As both the witnesses agreed to act as *panch-witnesses,* the first part of the *panchnama* was drawn in the office of Mr. Barot itself and necessary preparation was made for the purpose of carrying out the raid. Before proceeding to the spot indicated in the information, materials needed in a raid, such as, twine, sealing wax, etc. were obtained and carried by the police personnel. Thereafter, the members of the raiding party proceeded towards *Visama,* situated on Dudheshwar Road in a Government vehicle from Gaekwad Haveli. The vehicle, in which the members of the raiding party proceeded, was parked near Gate of Maheshwari Mills in such a manner that it was not possible for any one to identify the same. Thereafter, the members of the raiding party

proceeded on foot towards *Visama,* which is situated on Dudheshwar Road. A watch was maintained and after about 20 minutes, the person, whose description was given in the information, was spotted coming towards *Visama* from its north. Police Constable Mr. Mukeshkumar Natvarlal Vyas identified him as Chunilal Punmaji Marwadi i.e. the appellant in Criminal Appeal No. 1145 of 2000. After arrival at *Visama,* Chunilal occupied a seat constructed in *Visama.* After about 10 minutes, another person, wearing full sleeve shirt having coloured checks and blue coloured pant, arrived and went to the place where Chunilal Marwadi was sitting. Police Constable Mukesh Kumar identified the said person as Jangrejkhan Pathan i.e. appellant in Criminal appeal No. 951 of 2000. The movements of both the persons were closely monitored by the members of the raiding party. It was found that they were talking *inter se.* The one, who had come to *Visama* later on, i.e. Jangrejkhan Pathan took out something from right-hand side pocket of his pant and handed-over the same to Chunilal, and Chunilal placed the article, handed-over by Jangrejkhan, in left side pocket of his pant whereas Chunilal also gave something to Jangrejkhan which was accepted by Jangrejkhan. Thereafter, the members of the raiding party rushed at the *Visama* and apprehended both of them. They were, thereafter, taken

near an electric pole situated on west of *Visama.* In the presence of *panch-witnesses*, both the persons apprehended, were interrogated. On interrogation, one of the persons disclosed that his name was Chunilal Punmaji Marwadi of Chandlodia Village and that he was residing opposite Rampeer Temple, Mahendikuva, Dudheshwar, whereas another disclosed his name to be Jangrejkhan Firozkhan Pathan, residing behind Sangam Cinema, Sarkhej. PI Mr. Barot conveyed the information received by him to both of them and told that it was necessary to search their persons. Before effecting search of persons of the appellants, PI Mr. Barot offered both of them to be searched in presence of a Magistrate or a Gazetted Officer not belonging to Police Department, if so desired, but the offer made by Mr. Barot was declined by both of them. Two different memorandums indicating that provisions of Section 50 of the Act were complied with were prepared and served individually to the accused. Thereafter, the person of each accused was searched in presence of *panch-witnesses*. The search of person of Chunilal Punmaji Marwadi resulted into find of Rs.700/- (Rupees Seven Hundred Only) from back pocket of pant put on by him as well as polythene bag, which was heat sealed from left hand pocket of the pant put on by him. Chunilal Marwadi was asked as to what was the substance

placed in transparent plastic bag found from his pocket and he replied that it was Brown Sugar. Thereafter, person of Jangrejkhan Firozkhan Pathan was searched. Search of his person resulted into find of Rs. 376/- (Rupees Three Hundred And Seventy-Six Only) from pocket of shirt put on by him as well as two small plastic-bags, which were heat-sealed, in which grey coloured powder was placed. On interrogation, Jangrejkhan also informed PI Mr. Barot that the small plastic-bags contained Brown Sugar. PI Mr. Barot demanded pass or permit authorising them to possess Brown Sugar, but none could be produced by any of them. As it was necessary to carry out the investigation in a scientific manner, PI Mr.Barot asked his officer to contact expert of FSL on telephone and request the expert to come to the place. He also asked Police Sub-Inspector Mr. Bhatt to deliver a *yadi* to expert of FSL, asking him to come to the spot for the purpose of analysis of the powder found from the possession of two persons. Mr. Barot also asked Head Constable Kishoresinh to bring a person to weigh the substance found. Accordingly, Head Constable Kishoresingh requisitioned the services of one Bhavarsinh Veraji Rajput of Jamalpur. He weighed the substance found from possession of both the persons. The weight of the offending substance with polythene bag found from the

possession of Chunilal, was found to be 6 Gms and was marked as Mark 'A', whereas weight of bag found from possession of Jangrejkhan containing Brown Sugar, was found to be 4 Grms, which was marked as Mark 'B', and weight of another bag, which was found from his possession, was ascertained to be 3 Grams and 500 Milligrams and was marked as Mark 'C'. PI Mr. Barot had also arranged to inform Mr. Subhash Trivedi, who was the then ACP. Mr. Subhash Trivedi arrived at the spot when the substances found from the two accused were being weighed. Pursuant to receipt of intimation, Mr. G. D. Sharma, who was an expert serving in Forensic Science Laboratory (FSL), also arrived at the spot. He took out little quantity of powder from each bag to ascertain its character and nature and after carrying out preliminary tests, he opined that the substance found was Brown Sugar. Moreover, members of the raiding party, after smelling substances found, opined that the substance was Brown Sugar. The total weight of three plastic-bags with Brown Sugar was found to be 13 Grams and 500 Milligrams and value of Brown Sugar was estimated to be Rs.1,35,000/= (Rupees One Lakh Thirty Five Thousand Only). The bags were heat sealed and placed in a plastic box. Slip bearing signatures of *panch-witnesses* and PI Mr. Barot was affixed on the box. The box was,

thereafter, tied with twine and seal, bearing impression of “PI NDPS Cell, DCB, Ahmedabad City”, which was in English language, was applied thereon. The total amount of Rs. 1,076/- (Rupees One Thousand And Seventy-Six Only), which was found from both the accused, was also seized. Jangrejkhan Pathan was interrogated by PI Mr. Barot and he disclosed that he had obtained quantity of Brown Sugar from Sajid Khan @ Langdo of Sarkhej. The written Report given by expert of FSL, indicating that substance analysed was Brown Sugar, was obtained. Both the accused were served with Seizure Memo and thumb impression of accused Chunilal as well as signature of Jangrejkhan was obtained on office copy of the Seizure Memo. As it was *prima facie* indicated that the appellants were involved in commission of offence punishable under the Act, they were arrested and were served with Arrest Memos. After service of Arrest Memos on the accused, the Police Sub-Inspector Mr. Gulamhussain Hamedkhan Khan lodged his complaint before PI Mr. Barot. He handed-over the *muddamal* seized, the complaint, the *panchnama*, etc. to PSO of DCB Crime Branch, Ahmedabad. On the basis of complaint of Mr. Khan, C.R. No. 5015 of 1999 was registered against the accused for commission of offences punishable under Sections 21 and 29 of the Act. The complaint lodged by PI Mr. Khan was handed-over to

PSI Mr. R. B. Joshi for investigation. The Investigating Officer made necessary report to the Assistant Commissioner of Police, Crime Branch, Ahmedabad City, as required by Section 57 of the Act. He recorded statements of those persons who were found conversant with the facts of the case. Necessary intimation was given to the relatives of the accused that the accused were arrested for commission of offences punishable under the Act. On July 4, 1999, PSO Ganpatsinh handed-over the *muddamal* and other articles for safe custody to Rumalji Shivaji Sodha, who was Crime Writer Head at Crime Branch, DCB Ahmedabad City. Mr. Sodha made necessary entry in the Register maintained at the Police Station for having received the *muddamal* and kept the same in safe custody. On July 5, 1999, Crime Writer Head Mr. Sodha handed-over the *muddamal* to Head Constable Kishoresinh Bhimsinh to deliver the same to FSL for analysis. Accordingly, Head Constable Kishoresinh Bhimsinh handed-over the *muddamal* to FSL for analysis. The substances were analysed by FSL. The Report indicated that the substances analysed were Brown Sugar within the meaning of the Act. On completion of investigation, the two accused were charge-sheeted in the Court of learned Special Judge, Ahmedabad for commission of offence punishable under Section 21 read with Section 29 of the Act.

3. The learned Additional Sessions Judge, Ahmedabad, to whom the case was made-over for trial, framed necessary charge against both the accused at Exh. 1. It was read-over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) *panch,* Mohd. Farooq Mohd. Siddique Shaikh as PW 1, at Exh. 11; (2) Police Constable Mr. Mukeshkumar Natvarlal Vyas as PW 2, at Exh. 14; (3) PSI Mr. Gulamhussain Hamedkhan Khan as PW 3, at Exh. 16; (4) Constable Ganpatsinh Samantsinh as PW 4, at Exh. 18; (5) Police Sub-Inspector Mr. Tarunbhai Amratbhai Barot as PW 5, at Exh. 24; (6) Crime Writer Head Mr. Rumalji Shivaji Sodha as PW 6, at Exh. 38; (7) Head Constable Kishoresinh Bhimsinh Parmar as PW 7, at Exh. 42; and (8) Investigating Officer PSI Mr. Rameshkumar Bhavanishankar Joshi as PW 8, at Exh. 44, to prove its case against the two accused. The prosecution also produced documentary evidence, such as, the *panchnama,* indicating search of persons of two accused as well as seizure of Brown Sugar, at Exh. 13; the complaint lodged by PSI Mr. Gulamhussain Hamedkhan Khan, at Exh. 17; necessary extract of entry, indicating that information received was reduced into writing, at Exh. 20; intimation by PI DCB to officer in-charge of DCB Ahmedabad City, to register offences

pursuant to complaint of PSI Mr. Khan, at Exh. 21; *yadi* of articles seized, at Exh. 22; report by PI Mr. Barot to Assistant Commissioner of Police under Section 42 (2) of the Act, at Exh. 25; memorandum, indicating compliance of Section 50 of the Act, at Exh. 27; report of Scientific Officer, Mobile Investigation Van, indicating that the articles seized were Brown Sugar, at Exh. 29; seizure Memo, at Exh. 30; grounds of arrest, communicated to the accused, at Exh. 31; arrest Memo of original accused No. 1, at Exh. 32; intimation to District Magistrate, Ahmedabad, about arrest of original accused No. 1, at Exh. 33; arrest Memo of original accused No. 2, at Exh. 34; intimation to District Magistrate, Ahmedabad, about arrest of original accused No. 2, at Exh. 35; intimation to relative of accused No. 2 that he was arrested for having committed offences under the provisions of the Act, at Exh. 36; memorandum, indicating that *muddamal* with the offending substances were sized, at Exh. 40; report to Assistant Commissioner of Police made under Section 57 of the Act, at Exh. 46; certificate issued by Bhanversinh Veraji for having weighed substances, at Exh. 47; receipt by FSL for having received the *muddamal* for analysis at Exh. 49; report of analysis, at Exh. 52; the *panchnama*, indicating search of house of accused Jangrejkhan, at Exh. 61; etc., in support of its case

against the two accused.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to both the accused, circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements, as required by Section 313 of the Code of Criminal Procedure, 1973.

In his further statement, accused No. 1 i.e. Chunilal claimed that few days prior to the day of incident, he was passing on Dudheshwar Road and at that time, a person riding a cycle, who was drunk, had dashed with him, as a result of which, he had scolded that person and that person had slapped him, telling him that he was policeman belonging to Crime Branch and would teach a lesson to him, and, therefore, on July 3, 1999, between 9.00 P.M. And 10.00 P.M., police personnel, wearing plain clothes had come and taken him in a Jeep and lodged false case against him. Accused No. 2, i.e. Jangrejkhan, in his further statement, claimed that on July 3, 1999, he was taking meals with his family at his house and a policeman had entered his house to inquire about one Abdul Salam, which was objected to by him, and, thereafter, about 7 to 8 police personnel had

entered his house forcibly and after beating him and his son, he was dragged out of the house and when this was objected to by his wife, she was abused after which he was taken to Crime Branch where a false case was lodged against him.

In order to substantiate the defence, original accused No. 1 Chunilal Punmaji examined Rameshbhai Magaji Solanki as DW 1, at Exh. 57 as well as Govindbhai Sankarbhai Bodana as DW 2, at Exh. 58. Similarly, to substantiate his defence, accused Jangrejkhan examined Abdul Sattar Abdul Karim Shaikh as DW 1, at Exh. 60 as well as Valimohammed Amanatullah as DW 2, at Exh. 62 and Umedbhai Baheralibhai as DW 3, at Exh. 63 and also his wife, Jenab-bibi Jangrejkhan Patan as DW 4, at Exh. 64.

5. On appreciation of evidence adduced by the parties, the learned Judge held that it was proved by the prosecution that on July 4, 1999 at about 5.00 A.M. in the morning, accused No. 1 was found in possession of 6 Grams of Brown Sugar whereas accused No. 2 was found in possession of 7 Grams and 500 Milligrams of Brown Sugar at Mahendikuva, Dudheshwar Road, Ahmedabad, and committed offence punishable under the provisions of Section 21 and 29 of the Act. On scrutiny of the defence evidence, the

learned Judge found that the defence, that the accused were picked up from their respective residences because of enmity and were falsely implicated in the case, was not probabilised. In view of abovereferredto conclusions, the learned Judge has convicted the sole appellant in each appeal under Sections 21 and 29 of the Act and imposed sentences referred to earlier by judgment dated September 27, 2000, giving rise to abovenumbered two appeals.

6. Mr. E.E. Saiyyed, learned Counsel of the appellant in Criminal Appeal No. 951 of 2000 and Mr. M. R. Prajapati, learned Counsel of the appellant in Criminal Appeal No. 1145 of 2000, contended that the appellants were falsely implicated in the case, which is quite evident from the record as well as evidence adduced by the defence witnesses and, therefore, their conviction under Section 21 read with Section 29 deserves to be set aside. In order to substantiate this argument, it was pointed out from the record that an application dated September 18, 1999 was submitted by PSI Mr. RB Joshi, Crime Branch, Ahmedabad City, to learned Principal Judge, City Sessions Court, Ahmedabad City, with a request to issue warrant under Section 70 of the Code of Criminal Procedure, 1973 against absconding accused Sajid Khan and

though the record does not indicate that any order was passed by the learned Principal Judge on the application submitted by PSI Mr. Joshi, an arrest warrant was issued, which is quite evident from the order signed by Deputy Registrar, City Sessions Court, Ahmedabad on September 17, 1999 i.e. a day prior to filing of the application by PSI Mr. RB Joshi, which in turn, indicates that not only the record before the Court was fabricated, but false documents were prepared at the time of carrying out the raid to implicate the accused falsely, who are totally innocent and, therefore, the impugned judgment should be reversed. It was pleaded that Bhanversinh, who had weighed the substance, is not examined as one of the witnesses by the prosecution and in absence of his evidence, certificate issued by him that he had weighed the substances found from possession of the appellants, should not have been received in evidence at all and once Exh. 47, which is certificate allegedly issued by Bhanvarsinh, is taken out of consideration, no other evidence is adduced by the prosecution that the weight of substances found was the same, as indicated in the *panchnama* and, therefore, the appellants are entitled to acquittal. It was argued that non-examination of Bhanvarsinh has fatal effect on prosecution case, more particularly, when writings in documents, Exh. 47, differ

from signature appended thereto and, therefore, the appeals should be accepted. It was argued that a perusal of Exhs. 28 and 29 makes it evident that the letter, asking expert of FSL to come at the place where raid was carried out, to ascertain nature of the substances found from the possession of the appellants, was received by Mr. G. D. Sharma, whereas certificate, produced by the prosecution, indicting that substances seized were analysed on the spot and were *prima facie* ascertained to be Brown Sugar, does not bear signature of Mr. G.D. Sharma, as a result of which, the appellants are entitled to reasonable benefit of doubt. According to the learned Counsels of the appellants, the signature of Mr. G. D. Sharma, on Exh. 28, does not tally with the signature appended on document, which is produced on record of the case, at Exh. 29, and, therefore, the Court should come to the conclusion that a false case was foisted upon the appellants. As far as compliance of Section 42 (2)of the Act is concerned, it was argued that in fact, no report either under Section 42 (2) of the Act or Section 57 of the Act was sent to immediate official superior, as required by law nor provisions of Section 50 of the Act were complied with, but mere paper-work was done to show that those provisions were complied with and, therefore, the appellants, who are innocent, should be acquitted.

It was maintained that the testimony of Investigating Officer, Mr.R.B.Joshi, makes it very clear that he had not recorded statement of ACP Mr. Subhash Trivedi nor collected material to show that the so-called report, forwarded under Section 42 (2) and Section 57 of the Act, was in fact received by ACP Mr. Subhash Trivedi, and as there is non-compliance of mandatory provisions of the Act, the appeal should be allowed. It was further argued that non-examination of ACP Mr. Subhash Trivedi has also vitiating effect on prosecution case, entitling the appellants to have reasonable benefit of doubt. After referring to the testimony of Police Constable Mr. Mukesh Vyas, it was argued that there was no light in *Visama* and, therefore, the case of the prosecution that the appellant in Criminal Appeal No. 951 of 2000 had delivered Brown Sugar to the appellant in Criminal Appeal No. 1145 of 2000, or that raid was carried out and offending articles were found from persons of both the accused, should have been disbelieved by the learned Judge of the Trial Court. What was asserted was that the defence, that the appellants were falsely implicated in the case, stands completely probabilised by the evidence tendered by five defence *witnesses* and, therefore, the appeals should be accepted. Mr. M. R. Prajapati, learned Counsel of the appellant in Criminal Appeal No. 1145 of

2000, further pointed out that the testimony of *panch-witness* Mr. Shaikh, recorded at Exh. 11, shows that all the *muddamal* was seized before 1.30 A.M. to 2.00 A.M. whereas the testimony of complainant PSI Mr. Khan shows that ACP Mr. Subhash Trivedi had arrived on the spot at 3.00 A.M. and at that time, sealing procedure was going on, whereas testimony of PI Mr. Barot indicates that he had sealed the samples with the help of Constable, and as consistent evidence is not led by the prosecution regarding sealing of *muddamal* and / or arrival of ACP Mr. Subhash Trivedi on the spot, the prosecution case should be disbelieved. Both the learned Counsels maintained before the Court that the evidence on record is not appreciated by the learned Judge of the Trial Court in its true perspective and, therefore, the appeals be allowed.

Mr. N. D. Gohil, learned Counsel for the State, contended that Constable Mr. Mukesh Vyas, in his testimony before the Court, has reproduced the information received by him, which was later on conveyed by him to Mr. Barot, and it was also noted down in the Register maintained at the Police Station, and, as none of the Police Officers have any personal enmity with any of the appellants, the learned Judge was justified in

believing the case of the prosecution, that pursuant to information received by Police Officers, raid was carried out and offending articles were found from possession of the appellants. It was argued that the information is not only narrated by Police Constable Mr. Mukesh Vyas, but is also referred to by *panch-witness* as well as by the complainant in his complaint and also in the Report under Section 42 (2) of the Act as well as Report under Section 57 of the Act, and, therefore, it is wrong to contend that a false case was foisted upon the appellants. The learned Counsel argued that in view of testimony of Investigating Officer Mr.R.B. Joshi, recorded at Exh. 45, the learned Judge was justified in exhibiting the Certificate issued by Bhanversinh, who had weighed the offending substances, at Exh. 47, and the learned Counsels of the appellants are not justified in arguing that the prosecution case would fall to the ground once the contents of Certificate, Exh. 47, are ignored from consideration, because, according to the learned Additional Public Prosecutor, weight of the offending substances found from the possession of the appellants stands otherwise proved, which is quite evident from the contents of Report of analysis, produced by the prosecution at Exh. 52. The learned Additional Public Prosecutor maintained that similarly, non-

examination of the then ACP Mr. Subhash Trivedi is of no consequence, because it is not the case of prosecution that he was present at the time of search of persons of the appellants and seizure of offending articles from them. After referring to two documents produced on record at Exhs. 28 and 29, it was pointed out that Exh. 28 is signed by Mr. G. D. Sharma in English language, whereas Exh. 29 is initialled by him, and as question relating to difference in signatures of Mr. G. D. Sharma was not put to any of the prosecution witness nor raised by the accused before the Trial Court, the same should not be gone into by this Court while considering whether a false case was foisted upon the appellants. The learned Counsel of the Government contended that as the raid was carried out in public place, provisions of Section 42 would not be applicable to the facts of the case. In the alternative, it was argued that the evidence of record clinchingly establishes that provisions of Section 42 (2), Section 50 and Section 57 of the Act were scrupulously complied with and, therefore, the appellants are not entitled to any benefit of doubt, as claimed by their learned Advocates. After pointing out relevant portion of testimony of *panch-witness*, it was contended that the search was carried out with the help of light emitting from electricity pole

and, therefore, it is not correct to say that the raid was carried out in darkness by the members of the raiding party. According to the learned Additional Public Prosecutor for the State, cogent and convincing reasons have been assigned by the learned Judge of the Trial Court for disbelieving defence witnesses, and for convicting the appellants under Section 21 read with Section 29 of the Act and as the learned Counsels of the appellants have failed to dislodge those weighty reasons, the appeals which do not have merit, should be dismissed.

7. This Court has heard Mr. E.E. Saiyyed, learned Counsel of the appellant in Criminal Appeal No. 951 of 2000 as well as Mr. M. R. Prajapati, learned Counsel of the appellant in Criminal Appeal No. 1145 of 2000, and Mr. N. D. Gohil, learned Counsel of the State Government, at length and in great detail. This Court has also undertaken complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

8. The case of the prosecution that an information was received by Police Constable Mr. Mukesh Natvarlal Vyas that the appellant in Criminal Appeal No. 1145 of 2000

was dealing in Brown Sugar and that the appellant in Criminal Appeal No. 951 of 2000 was to come to *Visama*, constructed by the Corporation, to deliver Brown Sugar stands fully established by testimony of Police Constable Mr. Mukesh Kumar N. Vyas, which is recorded at Exh. 14. The case of prosecution that Police Constable Mr. M.N. Vyas had conveyed the information received by him to PI Mr. Barot stands fully established by the testimony of Police Constable M.N.Vyas, recorded at Exh. 14, as well as that of PSI Mr. G. H. Khan, recorded at Exh. 16, and also that of PI Mr. T. A. Barot, recorded at Exh. 24. Further, *panch-witness* Mohd. Farooq Shaikh, whose testimony, is recorded at Exh. 11, has in terms stated that he had acted as *panch-witness* and that he was informed about the secret information, which was received by Police Constable Mr. Vyas. The testimony of the above named witnesses stands corroborated by contemporary documents prepared and produced on record of the case. The prosecution has produced extract from Police Station Diary, maintained at Police Station, DCB, Ahmedabad City, at Exh. 20. It indicates that the information, which was conveyed by Police Constable Mr. Vyas to PI Mr. Barot, was reduced into writing, as required by Section 42 (1) of the Act. The fact that information was received, as claimed by Mr. Vyas, is reflected in the *panchnama* as

well as in the complaint, which was filed by PSI Mr. Khan. It is relevant to mention here that the record shows *Visama* is the place where dead bodies are being brought before taking them to crematorium. It is an open place constructed by the Corporation. It is neither building nor conveyance nor enclosed place, as contemplated by Section 42 (1) of the Act and, therefore, the provisions of Section 42 of the Act would not be applicable to the facts of the case. This is so in view of decisions rendered by the Supreme Court in: (1) **Rajendra and Another Vs. State of M.P., (2004) 1 SCC 432**; (2) **Krishna Kanwar (Smt.) alias Thakuraeen Vs. State of Rajasthan, (2004) 2 SCC 608**; and, (3) **State of Haryana Vs. Jarnail Singh and Others, (2004) 5 SCC 188**. The search of persons of the appellants and seizure of Brown Sugar from their possession had taken place at the place where electricity pole was installed and not at *Visama*. As search and seizure had taken place in public place, this Court is of the opinion that Section 42 of the Act is not applicable to the facts of the case at all. However, the prosecution has led evidence to establish that provisions of Section 42 were complied with. As noticed earlier, the information, received by Police Constable Mr.Vyas and conveyed to PI Mr. Barot, was reduced into writing, which is quite evident from

contents of entry brought on record of the case, at Exh. 20. Therefore, this Court is satisfied that the provisions of Section 42 (1) of the Act were fully complied with. The evidence on record clinchingly establishes that on receipt of information, necessary report was forwarded by PI Mr. Barot to his immediate official superior i.e. ACP and this is evident from contents of document produced at Exh. 25. The plea that no report was sent to ACP, as claimed by the prosecution nor provisions of Section 50 were complied with and mere paper-work was done to establish that those provisions were complied with, cannot be accepted. The documents, indicating compliance of Section 42 (1) and 42 (2), are produced on record during the course of examination of PI Mr. Barot, who had carried out the raid with his team. Different communications between PI Mr. Barot and ACP, DCB Ahmedabad City, would indicate that the office of the ACP was situated in the same building wherein office of PI Mr. Barot was located. The sending of Report under Section 42 (1) of the Act, and compliance of provisions of Section 50 of the Act are official acts. These official acts have been proved by the prosecution by production of necessary documents and, therefore, a presumption, under Section 114 of the Evidence Act, 1872, would arise that official acts were regularly performed.

For the purpose of proving that provisions of Section 42 were complied with, it was not necessary for the prosecution to examine ACP Mr. Subhash Trivedi. The requirements of Section 42 is that information received should be reduced into writing and that a Report should be forwarded by the officer, reducing information into writing, to his immediate superior official. Evidence of PI Mr. Barot makes it very clear that he had reduced the information into writing as soon as it was received by him from Police Constable Mr. Vyas. His evidence also establishes that he had forwarded the necessary Report to his immediate official superior i.e. ACP. Thus, evidence indicating compliance of the provisions of Section 42 is already tendered by prosecution by way of examining PI Mr. Barot and it was not necessary at all for the prosecution to examine ACP Mr. Trivedi. The prosecution case, therefore, cannot be thrown overboard on the ground of non-examination of ACP Mr. Trivedi, as is suggested by the learned Counsels of the appellants. Similarly, non-examination of Bhanversinh, who had weighed offending articles, is of little consequence. The fact that total weight of Brown Sugar with plastic bags was 13 Gms and 500 Milligrams stands established by the contents of the *panchnama*, the complaint, etc. This fact is also mentioned by Mr. Barot in his testimony recorded before

the Court. Exh. 47 is the Certificate issued by Bhanversinh, who had weighed the offending substances, wherein it is mentioned that the total weight of Brown Sugar with plastic-bags was 13 Gms and 500 Milligrams. Mr. R.B.Joshi, who is Investigating Officer, has stated in his evidence that he had recorded Police Statement of Bhanversinh, who had weighed the substances, and that Bhanversinh had confirmed that he had issued Certificate, which is produced on the record of the case at Exh. 47. Therefore, the learned Judge of the Trial Court has exhibited the Certificate issued by Bhanversinh at Exh. 47. In view of the testimony of Investigating Officer Mr. Joshi, it was not necessary for the prosecution to examine Bhanversinh as a witness to establish that he had weighed offending substances and that weight of offending substance was found to be 13 Gms and 500 Milligrams. Mr. R.B. Joshi had made himself conversant with the signature of Bhaversinh, which is quite evident from his testimony, and thereafter, tendered the Certificate before the Court. This course cannot be said to be contrary to law and is in consonance with the provisions of Section 47 of the Evidence Act, 1872, because Mr. R. B. Joshi had acquainted himself with the hand-writing of Bhaversinh. Under the circumstances, Certificate, Exh. 47, cannot be ignored by the Court, as is pleaded by the learned

Counsels of the appellants. Even if Exh. 47 is ignored from consideration, the fact that Brown Sugar, having net weight of 11Gms and 280 Milligrams, was found from the possession of the appellants stands fully established by the Report of the analysis, which is produced on the record of case at Exh. 52. It may be mentioned that in the Report of analysis, total weight of Brown Sugar with plastic-bags is mentioned to be 13 Grams and 240 MilliGrams. This is so because before sending *muddamal* to FSL for analysis, some *muddamal* was taken from the bags by expert of FSL, who had subjected the powder to tests on the spot. The fact that the appellants were found in possession of 11.280Gms of Brown Sugar cannot be doubted in view of cogent evidence on record and, more particularly, contents of Report analysed, which was produced by the prosecution, at Exh. 52. Therefore, exclusion of certificate, Exh. 47, from consideration cannot lead to acquittal of the appellants, as is claimed by their learned Counsels.

This brings the Court to consider the question whether the provisions of Section 50 were complied with. The testimony of PI Mr. Barot, beyond reasonable doubt, establishes that before effecting search of persons of the appellants, he had offered them to be searched in

presence of a Magistrate or a Gazetted Officer and that the said offer was declined by the appellants. This assertion of Mr. Barot gets full corroboration from the contents of the *panchnama* as well as the complaint lodged by PSI Mr. Khan promptly. The prosecution has produced document at Exh. 27, which is a memorandum, prepared on the spot to indicate compliance of provisions of Section 50 of the Act. This is not challenged by the defence at all. What is relevant to notice is that *panch* Mohd. Farooq Shaikh has also asserted in his testimony that offer, as required by Section 50 of the Act, was made by PI Mr. Barot to the appellants, but the said offer was turned down by the appellants. Though this witness has been cross-examined by the defence at length, nothing could be elicited on record, which would raise doubt about his assertion that provisions of Section 50 of the Act were complied with. Under the circumstances, there is no manner of doubt that provisions of Section 50 of the Act were complied with before effecting search of persons of the appellants. The contention that a false case was foisted upon the appellants and, therefore, the impugned judgment should be set aside, is devoid of merits. The claim of appellant, in Criminal Appeal No. 951 of 2000, is that the police, who had come in search of Abdul Salam, had picked him up from his house when he

was taking meals with his family and a false case was foisted upon him. In order to substantiate this defence, three witnesses have been examined by him. However, the evidence on record would indicate that on interrogation, the appellant, in Criminal Appeal No. 951 of 2000, had informed PI Mr. Barot that he had obtained quantity of Brown Sugar from Sajid Khan @ Langdo, who was residing behind Sangam Cinema, Sarkhej. The defence has not explained as to why Police Officer would come to the house of the appellant, in Criminal Appeal No. 951 of 2000, in search of Abdul Salam, who had no connection with this case at all. Therefore, the defence is not probabilised at all. Nothing could be brought on record by the appellants to suggest that any of the prosecution witnesses was on inimical terms with any of the appellants. Therefore, false implication of the appellants in this case stands ruled out. The learned Judge of the Trial Court, who had advantage of observing demeanour of the witnesses, has considered the evidence tendered by five defence witnesses and has come to the conclusion that their evidence is not reliable at all. For coming to this conclusion, cogent and convincing reasons have been assigned by the learned Judge, which is quite evident from the discussion made in paragraph-14 of impugned judgment. It is relevant to notice that wife of

the appellant, in Criminal Appeal No. 951 of 2000, never made grievance before any higher officer or authority or Court on July 3, 1999 that her husband was forcibly picked up from her house when he was taking his meals. This fact was not mentioned even in Bail Application, which was presented on behalf of the appellant in Criminal Appeal No. 951 of 2000, before the Trial Court. There is no manner of doubt that the defence, that he was picked up by the police when he was taking meals on July 3, 1999, was taken by Jangrejkhan subsequently on legal advice Therefore, it is difficult for this Court to conclude that false case was foisted upon the appellant in Criminal Appeal No. 951 of 2000. Similarly, the plea raised by the appellant in Criminal No. 1145 of 2000 that a false case was lodged against him because he had scolded the Constable, who had dashed his cycle with him in a drunken position, has no substance at all. Though two witnesses have been examined by him, this defence could not be probabilised at all. As observed earlier, the learned Judge of the Trial Court has given cogent and convincing reasons for disbelieving interested version of defence witnesses, with which this Court fully concurs. Therefore, the appellants are not entitled to any benefit on the ground that a false case was foisted upon them by police. The plea that Exh. 28 is signed by

Mr. G. D. Sharma, but Exh. 29 is initialled by him, or that filing of application subsequently for issuance of warrant against absconding accused after issuance of warrant would establish that a false case was made out against the appellants, cannot be accepted. It is relevant to notice that regarding discrepancy in signature of Mr. G. D. Sharma, no prosecution witness is asked any question at all. Similarly, though at first glance, it appears that the application for issuance of warrant against the absconding accused was filed on September 18, 1999, a close scrutiny of the same makes it evident that it was filed on September 16, 1999 and not on September 18, 1999, as claimed by the learned Counsels of the appellants. Under these circumstances, it is wrong to contend that order, issuing warrant, was passed earlier and thereafter, the application, praying the Court to issue warrant, was filed. Even if it is assumed that order issuing warrant was obtained first and thereafter the application for issuance of warrant was submitted, that fact by itself would not lead to conclusion that a false case was foisted upon the appellants because application for issuance of warrant was submitted by Investigating Officer Mr. Joshi and not by any one who had participated during search of persons of the appellants and find of Brown Sugar from their

possession. Further, this so-called inconsistency regarding date of filing of the application and issuance of warrant by the Court was not brought to the notice of any of the witnesses by the defence. Moreover, Exh. 50, which is an application, praying to issue warrant against absconding accused, is a carbon copy of the original and not original by itself, wherein date '16' is over-written and an attempt is made to show that it was submitted on September 18, 1999, but not on September 16, 1999. If attempt had been made to obtain clarification by the defence during the course of examination by the Investigating Officer Mr. Joshi, some explanation could have come on record. No attempt was made by the defence at all to point out to Mr. Joshi that he had obtained warrant for arresting absconding accused earlier and submitted application for warrant subsequently. Suffice it to say that the evidence on record does not indicate that any false case was foisted upon any of the appellants.

The plea that seizure had taken place in darkness and, therefore, the prosecution case should be doubted, also cannot be accepted. The fact that search and seizure was carried out in the light emitting from the bulb of electricity pole, stands amply proved by the

evidence of Constable Mr. M. N. Vyas, whose testimony is recorded at Exh. 14 as well as that of evidence of *panch-witness* Mr. Shaikh, who is examined at Exh. 11 and evidence of PI *Mr. Barot.* Therefore, the appellants are not entitled to any benefit on the ground that search and seizure was carried out in complete darkness and nothing incriminating was found from their possession.

A faint attempt was made by the learned Counsels of the appellants to argue that in view of amendment carried out in 2001 in the Act, the Court has discretion to impose lesser punishment than prescribed by law. However, the same was given up after it was brought to the notice of the learned Counsels of the appellants that the amendment is not retrospective, and before coming into force of the amendment, the case was already decided by the Trial Court. The provisions of the Act, as amended in the year 2001, cannot be pressed into service in view of the decision of the Supreme Court in **Basheer alias N.P.Basheer Vs. State of Kerala, (2004) 3 SCC 609.**

9. Except, abovereferredto submissions, no other submission has been advanced by the learned Counsels of the appellants for consideration of the Court. As the Court does not find any substance in any of the

contentions raised on behalf of the appellants, both the appeals are liable to be dismissed.

10. Therefore, both the appeals fail and are dismissed. *Muddamal* be disposed of in terms of directions given by the learned Judge in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath